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In The Supreme Court of the United States

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,

Petitioner,

v.

ALBUQUERQUE COMMONS PARTNERSHIP,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of New Mexico

BRIEF FOR *AMICI CURIAE* NEW MEXICO MUNICIPAL LEAGUE AND INTERNATIONAL MUNICIPAL LAWYERS ASSOC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ANITA MILLER*
223 Spring Creek Lane NE
Albuquerque, NM 87122
505.878.9598

CARL J. CIRCO
UNIVERSITY OF ARKANSAS
SCHOOL OF LAW
Fayetteville, AR 72701
479.575.2714

DAVID S. KING
QUINNIPIAC UNIVERSITY
SCHOOL OF LAW
275 Mount Carmel Ave.
Hamden, CT 06518
203.582.3213

Counsel for Amici

**Counsel of Record*

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COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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IDENTITY OF *AMICI CURIAE*

The International Municipal Lawyers Association and the New Mexico Municipal League (collectively, the "*amici*") file this brief in support of the Petition for certiorari filed by the City of Albuquerque.[1] The *amici* are organizations representing local government officials throughout the United States and New Mexico.

The International Municipal Lawyers Association ("IMLA"), previously known as the National Institute for Municipal Law Officers, is a non-profit, professional organization of over 3000 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and through advocacy by providing the collective viewpoint of local governments around the country on legal issues

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party currently representing Petitioner City of Albuquerque authored this brief in whole or in part, and no party or Counsel made a monetary contribution. At the behest of the *amici* only, Counsel for Petitioner in the initial proceedings in the New Mexico Court of Appeals and the New Mexico Supreme Court did advise Counsel of Record in preparation of this Amicus Brief. All counsel of record received timely notice of the intent to file the brief, and granted consent to the filing hereof.

before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The New Mexico Municipal League ("NMML") is a non-profit, nonpartisan corporation whose members are the incorporated municipalities of the State of New Mexico. All 102 New Mexico incorporated municipalities are members of the New Mexico Municipal League. League staff and officers frequently appear before state agencies and legislative committees to testify on rules, regulations, and proposed legislation affecting municipalities in New Mexico.

This case is of particular interest to IMLA and the NMML because of its far reaching consequences. As a result of this decision, local governments in New Mexico face inequitable penalties in reviewing and acting on ordinary land use matters, as compared to local governments in other states, based on an erroneous construction of the Fourteenth Amendment that has given rise to a deep split in court decisions. Unless this division is checked, local governments throughout the country will increasingly be hamstrung as they engage in the type of planning and legislation necessary to create harmonious, civil, and livable communities for the present and future.

I. RELEVANT FACTS

The *amici* refer to the statement of the case, factual background, and proceedings below set forth

in the Petition for a Writ of Certiorari filed by the Petitioner, the City Council of the City of Albuquerque, New Mexico, November 5, 2009, at 2 through 11, together with the appendices to the Petition. The *amici* wish to emphasize certain facts that are particularly relevant to this brief.

The property that was owned by Respondent, Albuquerque Commons Partnership, ("ACP") was originally within the City's 1981 uptown sector plan ("1981 USP"). Pet. App. 47a (¶4). In 1991, ACP's contract purchaser submitted a proposal to the City to build a "big box" retail project on the property; but ACP's contract purchaser withdrew that proposal. Pet. App. 48a (¶9). A second proposal was submitted later. Pet. App. 48a (¶6).

During the pendency of ACP's contract purchaser's proposal, the City reviewed a proposal to modify the 1981 USP with an intent to create a "true urban center for the City." Pet. App. 89a-90a (¶15). In 1995, the City Council unanimously approved the amendments to the USP. Pet. App. 93a (¶24).

ACP's contract purchaser's plan did not comply with the new requirements, but did comply with the older requirements. Pet. App. 52a (¶14); Pet. App. 70a-71a (¶41-42). Disappointed by the change in zoning, ACP elected to sue the City for damages under 42 U.S.C. § 1983 by attacking the City's procedures rather than to ask the New Mexico courts to require the City to provide the additional process

ACP claimed it deserved under state zoning law. Pet. App. 52a (¶15).

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE QUESTION OF WHETHER FINALITY IS A REQUIREMENT FOR A PROCEDURAL DUE PROCESS CLAIM IN A ROUTINE LAND REGULATION CASE.

As identified in the Petition for a Writ of Certiorari, the Circuit Courts of Appeals are divided about the extent to which a property owner must obtain final resolution of available state law remedies before asserting a claim under 42 U.S.C. § 1983 for a procedural due process violation arising out of a land use decision. More specifically, the Circuit Courts of Appeal disagree as to whether the reasoning of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) should apply to a claim of denial of procedural due process.

Some of the Circuit Courts of Appeals apply *Williamson County* to procedural due process claims under 42 U.S.C. § 1983. For example, the Seventh Circuit has held that "labels do not matter" and that regardless of whether a property owner is asserting a takings claim, a substantive due process claim, or a procedural due process claim, "[a] person contending that state or local regulation of the use of land has gone overboard must repair to state court." *River Park v. City of Highland Park*, 23 F.3d 164, 167 (7th

Cir. 1994). Similarly, a person seeking expansive due process rights in a zoning case should look to state land use procedures. See also *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88-89 (2nd Cir. 2002) (applying the ripeness requirements of *Williamson County* to procedural due process claims); *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (en banc) ("By contrast, a procedural due process violation is not complete 'unless and until the State fails to provide due process.'") (quoting *Zinermon v. Burch*, 494 U.S. 113, 126 (1990)); *Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1294 (3rd Cir. 1993) (applying *Williamson County's* finality requirement to a procedural due process claim). The Tenth Circuit, on the other hand, found the application of *Williamson County* to a procedural due process claim to be "incorrect" in a case involving takings and substantive due process claims to which *Williamson County* was applied, reasoning that the plaintiff could have a property interest in "specific permits." *Landmark Land Co. of Okla. v. Buchanan*, 874 F.2d 717, 719, 722, 723-724 (10th Cir. 1989), *abrogated on other grounds in Federal Lands Legal Consortium ex rel. Robart Estate v. United States*, 195 F.3d 1190, 1195 (10th Cir. 1999).

Two Circuit Courts of Appeals, meanwhile, have held that the *Williamson County* ripeness requirements may apply to procedural due process claims "depending on the circumstances of the case." *Harris v. County of Riverside*, 904 F.2d 497, 500 (9th Cir. 1990); see also *Bigelow v. Michigan Dep't of Natural*

Res., 970 F.2d 154, 159-160 (6th Cir. 1992) (discussing how the facts of the case may affect the ripeness of a procedural due process claim). In the Sixth Circuit, the most important "circumstance of the case" appears to be whether it "present[s] a pure claim of procedural due process, [or] instead involves several constitutional claims." *Id.* at 159. Supporting this distinction, the court noted that in the case before it "addressing the plaintiffs' procedural due process claim at this stage of the proceedings would allow future plaintiffs effectively to circumvent the ripeness requirement for takings claims simply by attaching a procedural due process claim to their complaint." *Id.* at 160.

The Eighth Circuit, meanwhile, appears to have its own unresolved internal conflict. In one case, the Eighth Circuit has held that plaintiffs must demonstrate the lack of an "adequate postdeprivation mechanism" under state law in order to assert a violation of the Due Process Clause. *Cormack v. Settle-Beshears*, 474 F.3d 528, 532 (8th Cir. 2007); see also *Wax 'n Works v. City of St. Paul*, 213 F.3d 1016, 1019 (8th Cir. 2000). In an earlier case, however, the Eighth Circuit expressly rejected a municipality's argument that a procedural due process claim was barred because "state remedies [were] available," determining that the proper inquiry was not whether state remedies were available but rather whether the plaintiff had "a right to a *pre*deprivation hearing." *Littlefield v. Afton*, 785 F.2d 596, 599, 600 (8th Cir. 1986), *overruled on other grounds*, see *Chesterfield Dev. Corp. v. Chesterfield*, 963 F.2d 1102, 1104 n.2

(8th Cir. 1992) (emphasis added). It is difficult to reconcile *Cormack*, which seems to categorically bar procedural due process claims where post-deprivation state law remedies are available, with *Littlefield*, which would seem to ignore any post-deprivation state law remedies upon a finding that a pre-deprivation hearing was required. The Eighth Circuit did not discuss or overrule *Littlefield* in *Cormack* or *Wax 'n Works*.

The existence of opposing interpretations on whether all state law remedies must be pursued, and finality achieved, to ripen due process claims under 42 U.S.C. § 1983 exposes municipalities in different parts of the country to widely divergent potential liabilities. While some municipalities may confidently exercise their delegated authority to regulate land use within their jurisdictions with knowledge that technical mistakes in procedure may be remedied by subsequent proceedings, other municipalities are burdened by the risk that mistaken interpretations of what procedures are required may give rise to a claim against the municipalities for crushing damages and attorneys fees.

Indeed, an aggressive applicant may view a procedural due process claim, or multiple claims, as a way to recoup operating expenses and opportunity costs even while an application is pending. Every decision of the municipality – to schedule a hearing on a particular day, to table a decision to the next meeting – becomes fodder for a procedural due process claim. While state law may provide for remedies for such actions, the federal Constitution

does not. As Justice Scalia said in his concurrence in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 200 (2003), "[f]reedom from delay in receiving a building permit is not among [those] fundamental liberty interests" protected by substantive due process. Nor should it be protected by more than minimal procedural due process.

The facts of this case amply demonstrate the need for finality as a prerequisite to a procedural due process claim. In the initial administrative appeal from the City's decision, the New Mexico District Court concluded that the City's actions had not complied with New Mexico requirements for the type of action involved, namely that a quasi-judicial hearing should have been held rather than the legislative process which the City used. Pet. App. 52a (¶15). The New Mexico Court of Appeals reversed this decision in *Albuquerque Commons Partnership v. City Council*, 149 P.3d 67 (N.M. Ct. App. 2006); and the New Mexico Supreme Court reversed it again. See *Albuquerque Commons Partnership v. City Council*, 184 P.3d 411 (N.M. 2008). However, the New Mexico courts did not grant the appropriate remedy available to them under New Mexico law: remanding the matter to the City Council to conduct the appropriate type of hearing and render a new decision. N.M. Stat. Ann. § 39-3-1.1 (2009). Rather, ACP was permitted to proceed to a jury verdict on its claim for damages under 42 U.S.C. § 1983 for a denial of procedural due process. Pet. App. 53a (¶15, 18).

Instead of providing the City Council with the opportunity to fix what the District Court had determined was an error, the subsequent proceedings resulted in monetary damages exceeding $8 million. The landowner was permitted to use 42 U.S.C. § 1983 to ambush a local government faced with a particularly knotty question about whether existing land use regulations created vested property rights under state law, a question which required resolution by the New Mexico Supreme Court. The Fourteenth Amendment surely does not act in such a ruthless manner as to allow for such a punitive result.

The *amici* represent municipalities ranging from the largest cities, with full time legislative bodies and decision-makers, professional staff and full time counsel, down to the smallest towns, which rely on volunteer citizens working long into the night to render fair decisions on zoning matters. While the Fourteenth Amendment identically applies to all municipalities, the split on this issue creates an inequity that could engender widely divergent approaches to procedures for the zoning process at the local level. One of the important aspects of the finality requirement that this Court enunciated in *Williamson County* is to provide an opportunity for municipalities to fix mistakes, to ensure that the procedural protections of the Fourteenth Amendment are observed.

Thus the *amici* support national uniformity on this issue, and urge this Court to grant *certiorari*.

III. THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH CONSISTENT REQUIREMENTS FOR PROCEDURAL DUE PROCESS IN LAND REGULATION CASES.

The Fourteenth Amendment protects "the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (citing *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)). When property interests are at stake, an appellate court reviewing a procedural due process claim addresses the issue in two steps. The first step is to ask whether a property right exists, created by an independent source of state law. *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 436 (4th Cir. 2002) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). The New Mexico Court of Appeals determined that ACP had a vested property interest in the form of "a right, under state law, to continued zoning in the face of downzoning or a map amendment unless the City was able to justify a zoning change . . . " under the requirements of state law and City ordinance. *Albuquerque Commons Partnership v. City Council*, 212 P.3d 1122, 1127 (N.M. Ct. App. 2009).

The second step is to determine whether a violation has occurred by "consult[ing] the entire panoply of predeprivation and postdeprivation process provided by the state." *Tri-County Paving, Inc.*, 281 F.3d at 436 (citing *Fields v. Durham*, 909 F.2d 94, 97 (4th Cir. 1990)).

This Court has held that the procedures due in a zoning case are minimal; municipalities may even make zoning decisions through the political process by putting the question to a popular referendum without violating the Fourteenth Amendment. See *Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 679 (1976); see also *River Park v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994). As noted by the Seventh Circuit in *River Park*, the fact that the substantive protection afforded private property under the Constitution is itself so limited explains the "reason why such scant process is all that is 'due' in zoning cases"; minimal process is sufficient because "[s]tate and local governments may regulate and even take property; they must pay for what they take but are free to use the land as they please." *Id.* at 167. See also *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 201 (2003) (Scalia, J., concurring) ("There is nothing procedurally defective about conditioning the right to build low-income housing on the outcome of a popular referendum").

"[T]he idea in zoning cases is that the due process clause permits municipalities to use political methods to decide, so that the only procedural rules at stake are those that local law provides. . . ." *River Park*, 23 F.3d at 167. The Constitution does not even require state and local governments to adhere to their procedural promises. *Olim v. Wakinekona*, 461 U.S. 238, 248–51 (1983).

Given that under this case law, the Fourteenth Amendment permits the City of Albuquerque to

amend the 1981 USP as a fully legislative matter without violating the procedural due process rights of ACP, it is immaterial whether the hearings held by the City Council allowed *ex parte* communications such that the hearings did not, in the eyes of the New Mexico Court of Appeals, constitute a "fair" tribunal. The legislative process is frequently "unfair" in its very nature as an expression of the popular will.

Further, there is a strong judicial interest in limiting the use of procedural due process to enforce state procedures in federal court through the vehicle of 42 U.S.C. § 1983.

> Apparently underlying the rationale of the lower federal courts is a concern that they not be overwhelmed by Section 1983 cases where the case is too typical of the "run of the mill" dispute between a landowner and a municipality, of the sort that involves permit and similar denials. These cases are consistent with Supreme Court cases holding that not every state tort gives rise to a "constitutional" tort actionable under Section 1983. A similar rationale has been used in other cases to refuse Section 1983 cases based on an estoppel claim and a claim that plaintiff was harassed by the enforcement of a nondiscriminatory ordinance.

Edward H. Ziegler, Jr., et al., 4 *Rathkopf's The Law of Zoning and Planning* § 66:28 (4th ed. 2002) (footnotes omitted). While ACP brought its federal claim in state court, the multimillion dollar verdict

ACP secured will inevitably encourage future developers to take their local battles to federal court.[2]

Against this backdrop, the *amici* are concerned about the divergence of state and federal decisions imposing various additional procedural requirements on land use decision-making. Not only may these inconsistent views reflect purely local perspectives on land use regulation, they ultimately lead to the argument that the failure to adhere to procedures based on state zoning law distinctions violates the Fourteenth Amendment's guarantees of procedural due process.

As this case demonstrates, technical nuances of a state's zoning law may find expression in a state court's heightened concern for procedural protections that go beyond anything the Constitution requires.

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[2] Judge Easterbrook's opinion in *River Park* reflects the frustration that federal courts face when a property owner tries to transform a local land use dispute into a matter of constitutional significance.

> Federal courts are not boards of zoning appeals. This message, oft-repeated, has not penetrated the consciousness of property owners who believe that federal judges are more hospitable to their claims than are state judges. Why they should believe this we haven't a clue; none has ever prevailed in this circuit, but state courts often afford relief on facts that do not support a federal claim. Is it that they have omitted the steps necessary to obtain review in state court and hope for the best in a second-chance forum? Well, we are not cooperating. Litigants who neglect or disdain their state remedies are out of court, period.

River Park, supra, 23 F.3d at 165.

While New Mexico should be free to inject a procedural element into state law principles that determine when a zoning classification creates a property right, for purposes of the Due Process Clause, a change affecting the permissible use of land in New Mexico should have no greater constitutional significance than does a comparable zoning change in Illinois.

The *amici* support national uniformity on this issue, because municipalities, large and small, be they western, southern, eastern, or northern, need a principled and consistent understanding of the steps required to ensure compliance with the Due Process Clause. Furthermore, this lack of uniformity hinders multi-jurisdictional efforts to study and promote standard best practices for land use procedures that strike the right balance between efficiency and fairness.

IV. CONCLUSION

For the foregoing reasons, the *amici* urge this Court to grant the Petition.

Respectfully submitted,

ANITA MILLER*
223 Spring Creek Lane NE
Albuquerque, NM 87122
505.878.9598

CARL J. CIRCO
UNIVERSITY OF ARKANSAS
SCHOOL OF LAW
Fayetteville, AR 72701
479.575.2714

DAVID S. KING
QUINNIPIAC UNIVERSITY
SCHOOL OF LAW
275 Mount Carmel Ave.
Hamden, CT 06518
203.582.3213

Counsel for Amici

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**Counsel of Record*